IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 7, 2007 Session

SHANNON MAYS v. MUSIC CITY RECORD DISTRIBUTORS, INC.

Appeal from the Circuit Court for Davidson County
No. 03-C2581 Marietta Shipley, Judge

No. M2006-00932-COA-R3-CV - Filed on July 27, 2007

Employee sued Employer under the Tennessee Human Rights Act (THRA) alleging repeated acts of sexual harassment in the work place by supervisory personnel. After Employer's Motion for Summary Judgment was denied, the case was tried on its merits, non-jury, resulting in judgment for Employee. Employer appealed this judgment but limited the appeal to the assertions that the trial court erred in denying its Motion for Summary Judgment and in holding that Employer had failed to prove by a preponderance of the evidence its affirmative defenses. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

W. Judd Peak, Nashville, Tennessee, for the appellant, Music City Record Distributors, Inc.

Stephen Childers Crofford and Mary A. Parker, Nashville, Tennessee, for the appellee, Shannon Mays.

OPINION

Shannon Mays, a young recent college graduate, was employed by Music City Record Distributors, Inc. (MCRD) in January of 2003. She continued to work for MCRD until she resigned on May 15, 2003. During the entirety of this employment, her immediate supervisor was Bruce VanLangen.

What happened during her five-month employment with MCRD must be gleaned from what is essentially a swearing contest between Ms. Mays on the one hand and witnesses for MCRD on the other. Ms. Mays testified that she had been employed at MCRD only two or three days when Carl Hunter, Vice President of Advertising, began making suggestions to her that she should go out and have drinks with him. He came to her office two, three and four times a week at various times

suggesting that he wanted to go out and make out with her. Among Mr. Hunter's duties were to bring her paychecks that were due her. She testified:

> Q. Tell the Judge about the paycheck. What would he do when he brought your paycheck down every two weeks?
>
> A. He would bring the paycheck to me and he'd act like he was going to hand it to me. And I would go take to it [sic] and he'd snatch it back. And he'd be like, you going to go out with me? Or sometimes he wasn't -- he'd come out and say, you want to have sex?
>
> And if I didn't actually say yes, he would actually walk out of my office with my paycheck in his hand. And, I mean, granted, he would bring it back, but it would be several hours later. I mean, he would walk around to everybody else. He would wait until almost five o'clock before he brought it back. And then, even if he did, he would say, so are you ready to have sex with me yet?

She further testified as to sexually offensive conduct by Bruce Carlock, the President of the Company; Mike Wise, Vice President of the Company; and, Wayne Volkovich, Retail Coordinator for the Company. Witnesses for the defense sought to establish that the incidents claimed by Ms. Mays as being sexual harassment either did not occur or were grossly overstated.

The trial court filed a post-trial memorandum deciding the case in favor of Ms. Mays and rejecting the affirmative defenses offered by MCRD. The trial court held in part:

> In this case, all the alleged harassment was by supervisory personnel, (except Mike Miller) thus the employer is then afforded several affirmative defenses:
>
> 1, The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
>
> 2. That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective policies provided by the employer or to avoid harm otherwise.
>
> In this case, as in many such cases, there is obviously a dispute in the testimony. The court finds that Ms. Mays' testimony is quite credible. This was a young woman who had graduated from college and had a young child to take care of. She lived with her parents, as this was her first job. The father of the child did not contribute to the child's support. The work at this employer was good work. She had a lot of responsibility for someone who had just graduated from college. The pay was low ($10 per hour), but she was doing what she had trained for. When Mr. Hunter first started asking her out and asking her to make out, she sort of sluffed the remarks off. It is entirely plausible that Mr. VanLangen, who was low on the totem pole, told her to have nothing to do with Carl Hunter, a man more than twice her age. It is equally plausible that Mr. VanLangen had to pull Carl Hunter out of her office,

when his remarks became increasingly more graphic and demanding. It is no wonder, Mr. Hunter came down to visit her when Mr. VanLangen was out of his office. Mr. Hunter admits he came down to visit her when she was alone and that he talked about how she could make out in the basement, when no one was around. The court finds that as to Mr. Hunter, her testimony rings truer than Mr. Hunter's testimony does.

As to the testimony of Mr. Wise, he corroborates her allegations completely.

As to Bruce Carlock, there is a question whether the behavior alleged was on her "work-time." The court would have found it more credible that Mr. Carlock had dismissed the entire conversation as to the "whorehouse" and the "logo" as just kidding around, a joke, a misunderstanding, flirtatious behavior on a boat while drinking. However, he categorically denied all. Ms. Rollfsz and Mr. VanLangen both admitted she had told both of them the same story on the Monday after the Riverstages festival.

MCRD filed a timely appeal.

I. STANDARD OF REVIEW

This non-jury case is reviewed on appeal under Tenn. R. App. P. 13(d), which provides for appellate review *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings of fact of the trial court unless the preponderance of the evidence is otherwise. The findings of law by the trial court are reviewed *de novo* without such a presumption. *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 15 (Tenn.1997).

Also applicable in fact-driven cases dependent upon credibility determinations, is the rule that great deference is accorded on appeal to the credibility findings of the trial court, having had the opportunity to observe the manner and demeanor of the witnesses while they were testifying. *Mitchell v. Archibald*, 971 S.W.2d 25, 29-30 (Tenn.Ct.App.1998).

II. SUMMARY JUDGMENT

The first issue presented for review by MCRD is "[w]hether the trial court erred in not granting a summary judgment for Defendant." The trial court denied the Motion for Summary Judgment, and the case proceeded to a non-jury trial on the merits with judgment rendered in favor of Ms. Mays. MCRD appeals the judgment on the merits, but seeks first to have this Court review the refusal of the trial court to grant summary judgment. While there is authority for the view that an overruled summary judgment motion is reviewable on appeal following trial on the merits of the case, 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2715 (3d ed. 1998); *see also Comsource Indep. Foodservice v. Union Pac. R.R. Co.*, 102 F.3d 438 (9thCir.1996); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7thCir.1988), Tennessee

follows the overwhelming majority of jurisdictions that have considered such an issue and concludes that such summary judgment is not reviewable on appeal. *Bradford v. City of Clarksville*, 885 S.W.2d 78, 80 (Tenn.Ct.App.1994); *Emerson v. Oak Ridge Research Co.*, 187 S.W.3d 364 (Tenn.Ct.App.2005); *Franklin v. Swift Transp. Co., Inc.*, 210 S.W.3d 521 (Tenn.Ct.App.2006). *See also Jarrett v. Epperly*, 896 F.2d 1013 (6th Cir.1990); *Black v. J.I. Case Co., Inc.*, 22 F.3d 568 (5th Cir.1994); *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125 (2ndCir.1999); *Lind v. United Parcel Serv., Inc.*,254 F.3d 1281 (11thCir.2001).

The first issue raised by MCRD is without merit since the denial of summary judgment is not reviewable on appeal following a trial on the merits.

The only other issue presented for review by MCRD is "[w]hether Defendant demonstrated its affirmative defense that precludes a judgment for Plaintiff." MCRD does not challenge the existence of a hostile work environment but limits its appeal to the affirmative defense articulated in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (U.S.1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (U.S.1998). In *Ellerth*, this affirmative defense is explained:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . . The defense comprises two necessary elements: (a) that the employer exercise reasonable care to prevent and correct promptly sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.

Burlington Indus., Inc., 524 U.S. at 765.

Section 703 of the Employee Handbook issued by MCRD provided:

> **703 Sexual and Other Unlawful Harassment**
> Effective Date: 2/1/00
> Revision Date: 1/31/00
>
> MCRD is committed to providing a work environment that is free of discrimination and unlawful harassment. Actions, words, jokes, or comments based on an individual's sex, race, ethnicity, age, religion, or any other legally protected characteristic will not be tolerated. As an example, sexual harassment (both overt and subtle) is a form of employee misconduct that is demeaning to another person, undermines the integrity of the employment relationship, and is strictly prohibited.

> Any employee who wants to report an incident of sexual or other unlawful harassment should promptly report the matter to his or her supervisor, who will be required to submit a written report of the incident to the Vice President.. If the supervisor is unavailable or the employee believes it would be inappropriate to contact that person, the employee should immediately contact the Vice President or any other member of management. Employees can raise concerns and make honest reports without fear of reprisal.
>
> Any supervisor or manager who becomes aware of possible sexual or other unlawful harassment should promptly advise the Vice President or any member of management who will handle the matter in a timely and confidential manner.
>
> Anyone engaging in sexual or other unlawful harassment will be subject to disciplinary action, up to and including termination of employment.

Since the appeal in this case is limited to the *Ellerth-Faragher* affirmative defense as adopted by the Supreme Court of Tennessee in *Parker v. Warren County Util. Dist.*, 2 S.W.3d 170 (Tenn.1999), both the sexual harassment and the hostile work environment are effectively conceded by MCRD both at the bar of this Court and by the limited scope of the appeal. Since no tangible employment action was taken against Ms. Mays, we address only the two-prongs of the affirmative defense under which MCRD must prove by a preponderance of the evidence "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Parker*, 2 S.W.3d at 175.

A defendant cannot satisfy the first prong of the affirmative defense by simply promulgating an adequate sexual harassment policy.

> While the affirmative duty on the part of the employer will often include the requirement that it have some sort of sexual harassment policy in place, the duty does not end there. Prong one of the affirmative defense requires an inquiry that looks behind the face of a policy to determine whether the policy was effective in practice in reasonably preventing and correcting any harassing behavior.

Clark v. United Parcel Serv., Inc., 400 F.3d 341, 349 (6th Cir.2005).

Ms. Mays did what she was required to do under the employer's policy. She promptly reported the incidence of unlawful harassment to her supervisor, Bruce VanLangen. Under the same policy, her supervisor was "required to submit a written report of the incident to the Vice President." Under the policy, the employee has further duties, which are contingent duties. If the "supervisor is unavailable" or "the employee believes it would be inappropriate to contact that person," then the employee "should immediately contact the Vice President or any other member of management."

The proof is clear in this case that having done that which the policy required Ms. Mays to do and there being no evidence that VanLangen was unavailable or that the employee believed it would be inappropriate to report to him, the next move was up to Ms. Mays' supervisor who is "required to submit a written report of the incident to the Vice President." Not only does the proof establish that VanLangen made no such report, but according to the testimony of Ms. Mays which was accepted by the trial court, he told her, "If I came forward, I would probably lose my job, it wasn't a good idea, that he had known other people to complain and pretty much nothing was done about it. If anything, it was like a slap on the wrist, and you know turned your head the other way." By VanLangen's testimony, he had never been trained on how to handle sexual harassment complaints and had never been informed by upper management that if anybody complained about sexual harassment, he was to file a written report. He further testified that he had never even looked at the sexual harassment reporting procedure before Ms. Mays left her employment.

The trial court found:

> Although the handbook was well done, likely by an attorney, there was apparently little training or implementation of the policy. When Ms. Mays was hired, she was not given a copy of the handbook, as one was not available. Bruce Van Langen, the art director and her immediate supervisor, had never been trained in any of the policies, particularly the sexual harassment policy. He testified that he did not know of the policy, nor had been informed of the policy. No one testified that they had received any training on the policy as to what was objectionable or to whom to report any allegation of sexual harassment.

The evidence, and particularly the testimony of VanLangen clearly supports these findings of the trial court.

MCRD does not meet its obligation under the first prong of the affirmative defense by adopting a facially reasonable sexual harassment policy. It must also take steps to implement that policy.

> While there is no exact formula for what constitutes a "reasonable" sexual harassment policy, an effective policy should at least: (1) require supervisors to report incidents of sexual harassment, *see Varner v. Nat'l Super Markets, Inc.* 94 F.3d 1209, 1214 (8th Cir.1996); (2) permit both informal and formal complaints of harassment to be made, *Wilson v. Tulsa Junior Coll.,* 164 F.3d 534, 541 (10th Cir.1998); (3) provide a mechanism for bypassing a harassing supervisor when making a complaint, *Faragher,* 524 U.S. at 808, 118 S.Ct. 2275; and (4) and provide for training regarding the policy, *Wilson,* 164 F.3d at 541. As previously set forth, UPS's policy facially meets all of these requirements, and therefore on paper, as even the EEOC concedes in its amicus brief, UPS has a reasonable sexual harassment policy.

> Nonetheless, the EEOC finds fault with UPS because UPS did not take preventative and corrective measures in response to Brock's misconduct. Appellants and the EEOC argue that none of the supervisors who witnessed Brock's behavior took any action towards stopping the harassment. If, prior to Robbins's investigation, UPS unreasonably failed to prevent and correct Brock's harassing conduct, then UPS would not be able to satisfy prong one of the affirmative defense. *Faragher,* 524 U.S. at 805-06, 118 S.Ct. 2275 (noting that the primary purpose of Title VII is not to provide redress for harassed employees, but to avoid the harm in the first place); *see also* 29 C.F.R. 1604.11(f) (cautioning employers to take all steps necessary to prevent sexual harassment from occurring). Thus, we must determine whether UPS's sexual harassment policy was effective in practice.
>
> The effectiveness of an employer's sexual harassment policy depends upon the effectiveness of those who are designated to implement it. As an initial matter, appellees argue that the supervisors who witnessed Brock's behavior had no duty to take corrective or preventative action even if they did witness harassment by Brock, because none of them was his superior. The appellees argue that the low- to mid-level supervisors who witnessed the interactions between Brock, Clark, and Knoop had no duty to convey their knowledge to UPS, because these supervisors were not high enough in the company hierarchy and had no authority to control Brock. This argument might have merit but for the fact that UPS itself has, through its sexual harassment policy, placed a duty on *all* supervisors and managers to report[ ] incidents of sexual harassment to the appropriate management people. *See Coates v. Sundor Brands, Inc.,* 164 F.3d 1361, 1364 (11th Cir.1999) (holding that when an employer designates certain employees as implementors of its policy, when those employees become aware of misconduct, the employer has itself answered the question of when it would be deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures). Therefore, the supervisors at issue here were among those designated to implement the policy. Consequently, we must consider whether, as implementors of UPS's sexual harassment policy, the supervisors here acted reasonably-in response to what they observed-to prevent and correct sexual harassment.

Clark, 400 F.3d at 349-50.

MCRD has not established the first prong of its affirmative defense, and the evidence clearly does not preponderate against the findings of the trial court.

III. CONCLUSION

Ms. Mays is entitled to reasonable attorney's fees on appeal in this case under Tenn. Code Ann. § 4-21-306(a)(7) and Tenn. Code Ann. § 4-21-311 (2005). *See Forbes v. Wilson County Emergency Dist. 911 Bd.*, 966 S.W.2d 417, 422 (Tenn.1998).

The judgment of the trial court is in all respects affirmed and the case remanded to the trial court for an award of reasonable attorney's fees on appeal to Ms. Mays and such other proceedings as may be necessary. Costs of the cause are assessed to MCRD.

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WILLIAM B. CAIN, JUDGE